BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DARRELL J. JONES	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,059,933
JUNCTION CITY WIRE HARNESS	)	
Respondent	)	
AND	)	
	)	
CITIZENS INSURANCE COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the September 27, 2012, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Lara Q. Plaisance of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 28, 2012, preliminary hearing and exhibits thereto; the transcript of the September 18, 2012, deposition of Mitch LeBard and exhibit thereto; the transcript of the July 6, 2012, deposition of Kayla Fisher, RN, and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant accidentally crushed his right index finger on February 2, 2012, while working for respondent. Claimant failed to turn off the machine and tapped a pedal while changing terminals on the machine. His right index finger got caught in the machine. A sample of claimant's urine was obtained at Geary Community Hospital Occupational Health (Geary Occupational Health) when claimant was provided treatment on the day of the accident. Claimant's urine was tested and the results indicated claimant's urine was positive for drugs. A split sample of the urine sufficient for testing was not retained and made available to claimant within 48 hours of the positive test.

ALJ Sanders determined claimant's drug test results were not admissible, as a sample of claimant's urine was not retained and made available to him within 48 hours of the positive test. The ALJ also determined claimant did not recklessly violate respondent's work safety rules.

Respondent contended the requirements of K.S.A. 2011 Supp. 44-501(b)(3) do not apply in this instance as a third party, Geary Occupational Health, collected the urine sample from claimant. Because Geary Occupational Health is not claimant's employer, respondent asserts a split sample of claimant's urine did not have to be retained and offered to claimant within 48 hours for testing. Therefore, the drug test results are admissible. Respondent also asserts the claim is not compensable because claimant recklessly violated respondent's workplace safety rules.[1] Claimant asks the Board to affirm the ALJ's Order.

The issues before the Board are:

1. Are the results of claimant's drug test admissible? Specifically, where a drug test sample is obtained from a claimant by someone other than the employer, must the conditions set out in K.S.A. 2011 Supp. 44-501(b)(3) be met?

2. Did claimant's injury result from a reckless violation of respondent's safety rules or regulations?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

On February 2, 2012, claimant was performing his regular duties operating a machine for respondent. Claimant began changing the terminal, which required a metal part to be tightened or loosened when the safety cover is off. The machine began operating and claimant crushed his right index finger, nearly amputating it. The machine is operated by means of a foot pedal. Claimant testified that he left the power on and may have accidentally touched the foot pedal, causing the machine to operate.

The machine has a power switch that is in a yellow box. There is a light in the box that illuminates when the machine has power. Claimant testified that at the time he injured his finger, the light was not luminous. However, claimant had not reported to anyone that the light was malfunctioning and did not know how long the light had not been working.

[1] See K.S.A. 2011 Supp. 44-501(a)(1)(D).

Following the accident, claimant went to the emergency room of Geary Occupational Health, where claimant provided a urine sample for a drug screen. This was done at respondent's request. Claimant denied using any illegal drugs during the six months prior to the accident. Two weeks after the accident claimant was told he tested positive for drugs. However, claimant was never offered a split sample of the urine so it could be tested. Claimant was discharged by respondent on March 1, 2012, for failing the drug test. On April 15, 2012, claimant was released to return to full duty.

Claimant acknowledged receiving training on how to operate the machine and that it was necessary to turn off power to the machine in order to change the terminal. On one other occasion claimant forgot to turn off the machine before changing the terminal. Claimant indicated that he usually turned off the machine, but on February 2, 2012, he forgot. He testified, "I didn't do it on purpose."[2] Prior to the accident, claimant had never been reprimanded for how he operated the machine.

When claimant went to the Geary Occupational Health emergency room, he was accompanied by Cynthia Carlyon, respondent's human resource administrator at the time of the accident. Claimant was aware that when he provided a urine sample, it would be tested for drugs. Claimant admitted that he was familiar with respondent's employee handbook and that it required an employee injured in a work-related accident to be tested for drugs. Claimant conceded signing a document indicating he had received a copy of the employee handbook.

Ms. Carlyon testified she took claimant through an orientation process when he was first hired, which addressed general safety issues. She did not provide claimant with any training on the machines he operated. Ms. Carlyon indicated that during claimant's employment with respondent, claimant had never been written up for a safety violation. Ms. Carlyon admitted that respondent had a business relationship with Geary Occupational Health and testified, "They were a business that offered a service and we, we hired them for that."[3]

Felipe Trujillo, claimant's supervisor, testified of going over safety rules with claimant when training him. Mr. Trujillo specifically recalled telling claimant to turn off the machines if he had to take off a safety cover to make an adjustment. Mr. Trujillo recalled an occasion when he ran the machine and forgot to turn off the machine while making adjustments.

Kayla Fisher, a nurse at Geary Occupational Health, testified that on February 2, 2012, she conducted a drug screen on claimant. Ms. Fisher described respondent as a client of Geary Occupational Health and that Geary Occupational Health was paid by

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[2] P.H. Trans. at 29.

[3] *Id.*, at 41.

respondent to collect claimant's urine sample. Claimant provided Ms. Fisher a urine sample that was preliminarily tested the same day at Geary Occupational Health to determine if it was negative or non-negative[4] for drugs. Claimant's urine sample was non-negative.

Claimant's urine sample was sent by Ms. Fisher on February 2, 2012, via United Parcel Service to MEDTOX for further testing. MEDTOX is a laboratory located in St. Paul, Minnesota. On February 7, 2012, Ms. Fisher received a fax from MEDTOX indicating claimant's urine sample was positive for carboxy-THC, a metabolite of marijuana. When she received the confirmatory test results from MEDTOX, Ms. Fisher faxed the results to respondent, but did not notify claimant. Ms. Fisher testified that Geary Occupational Health did not retain part of the urine sample, nor did MEDTOX save a split sample.

Mitchell F. LeBard, associate director of forensic toxicology at MEDTOX, testified that claimant's urine sample tested positive for 78 nanograms per milliliter of carboxy-THC. Mr. LeBard indicated that MEDTOX uses a gas chromatography-mass spectrometry to confirm the results. The results are then reviewed by an independent medical review officer, Dr. Neil J. Dash. Mr. LeBard testified that MEDTOX did not have any records indicating that it or the medical review officer offered a split sample of the urine to claimant for testing.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501, in part, states:

> (a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:
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> . . . .
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> (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or
>
> . . . .
>
> (b)(1)(A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.

[4] Ms. Fisher testified the term "non-negative" was used, rather than "positive."

(B) In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months.

(C) It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

	Confirmatory test cutoff levels (ng/ml)
Marijuana metabolite[1]	15
Cocaine metabolite[2]	150
Opiates:	
Morphine	2000
Codeine	2000
6-Acetylmorphine[4]	10 ng/ml
Phencyclidine	25
Amphetamines:	
Amphetamine	500
Methamphetamine[3]	500

[1] Delta-9-tetrahydrocannabinol-9-carboxylic acid.
[2] Benzoylecgonine.
[3] Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.
[4] Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

(D) If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence.

(E) An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

(2) The results of a chemical test shall be admissible evidence to prove impairment if the employer establishes that the testing was done under any of the following circumstances:

(A) As a result of an employer mandated drug testing policy, in place in writing prior to the date of accident or injury, requiring any worker to submit to testing for drugs or alcohol;

(B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

(C) the worker, prior to the date and time of the accident or injury, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident or injury;

(D) the worker voluntarily agrees to submit to a chemical test for drugs or alcohol following any accident or injury; or

(E) as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post-injury testing program and such required program was properly implemented at the time of testing.

(3) Notwithstanding subsection (b)(2), the results of a chemical test performed on a sample collected by an employer shall not be admissible evidence to prove impairment unless the following conditions are met:

(A) The test sample was collected within a reasonable time following the accident or injury;

(B) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(C) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(D) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;

(E) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee; and

(F) a split sample sufficient for testing shall be retained and made available to the employee within 48 hours of a positive test.

This Board Member finds that claimant's drug test is inadmissable pursuant to K.S.A. 2011 Supp. 44-501(b)(3)(F). Clearly, no split sample was retained and made available to claimant within 48 hours of determining claimant's urine sample tested positive for carboxy-THC. Respondent argues the conditions set out in K.S.A. 44-501(b)(3) only apply where an employer obtains the sample to be tested. Here, respondent directed a urine sample be obtained from claimant. Respondent contracted with Geary Occupational Health and paid it to collect a urine sample from claimant. Geary Occupational Health

provided the drug test results to respondent and not claimant. Geary Occupational Health acted as respondent's agent when collecting claimant's urine sample. In essence, respondent, who is claimant's employer, obtained the urine sample from claimant.

The fact that a third party actually took the sample from claimant does not relieve respondent from meeting the conditions set out in K.S.A. 2011 Supp. 44-501(b)(3). To find otherwise would mean that every employer could purposely avoid the conditions of K.S.A. 2011 Supp. 44-501(b)(3) by sending their injured employees to a laboratory, clinic or other third party to obtain a sample for testing. If respondent's legal theory were adopted: (1) a sample would not have to be collected within a reasonable time following the accident or injury; (2) the collecting and labeling of the test sample would not have to be performed by or under the supervision of a licensed health care professional; (3) the test would not have to be performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment; (4) the test would not have to be confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method; (5) the foundation evidence would not have to establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee; and (6) there would be no requirement to retain a split sample sufficient for testing and make it available to the employee within 48 hours of a positive test.

The second issue raised by respondent was that claimant recklessly violated respondent's workplace safety rule of turning off the power to the machine before changing terminals. This Board Member disagrees and finds there was insufficient evidence to find claimant recklessly violated a safety rule. Prior to the accident on February 2, 2012, claimant was never cited for violating a safety rule. Claimant indicated that he did not purposely leave on the power to the machine. He also testified that a light on the machine indicating if the power was on, had malfunctioned. Claimant's supervisor, Mr. Trujillo, indicated that on one occasion he had inadvertently left the power to the machine on when changing the terminal.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

WHEREFORE, the undersigned Board Member affirms the September 27, 2012, Preliminary Hearing Order entered by ALJ Sanders.

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[5] K.S.A. 2011 Supp. 44-534a.

[6] K.S.A. 2011 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this ____ day of January, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

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